IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BRUCE MORTENSEN, Plaintiff/Appellant, v. AL ROSE, L.L.C., an Arizona limited liability company, Defendant/Appellee.	2 CA-CV 2007-0078 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20054765

Honorable Charles V. Harrington, Judge

AFFIRMED

Michael Baldwin, PLC
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P E L A N D E R, Chief Judge.

¶1 In this appeal arising from the dismissal of an action pursuant to Rule 38.1, Ariz. R. Civ. P., appellant Bruce Mortensen argues the trial court erred in not reinstating his complaint against appellee Al Rose, L.L.C. (Rose). Finding Mortensen's arguments either waived or without merit, we affirm.

Background

¶2 Mortensen filed this action in August 2005, alleging two counts of breach of contract arising from a lease agreement against Rose, its "managing member," and her husband. In November, when he had not yet served Rose, the trial court issued a "[n]otice of impending dismissal." Mortensen then moved to continue the case on the court's inactive calendar for ninety days to allow him "to accomplish service of process" because he "ha[d] been unable to locate the Defendants." The court granted the motion in January 2006. In April, however, the court dismissed the action because Mortensen still had not served Rose.

¶3 Five days later, Mortensen filed several affidavits of publication and moved the trial court to set aside the dismissal and "reinstate the Complaint." The court again granted the motion. Mortensen then applied for an entry of default. Pursuant to Rule 55(a)(1), Ariz. R. Civ. P., a copy of the application was sent to Rose's last known address. Rose then moved to dismiss or "quash service," arguing Mortensen had not properly effected service by publication because he had "provided no evidence of prior attempts to serve the Defendants prior to attempted service by publication."

¶4 The record reflects neither the entry of default against Rose nor any ruling on its motion. In May 2006, however, the trial court issued a notice that the matter had been placed on the inactive calendar and "w[ould] be dismissed without further notice after 60 days unless" a motion to set and certificate of readiness were filed, the court ordered the matter continued on the inactive calendar for good cause shown, or a final judgment was entered. In June, Mortensen effected personal service on Rose, who then filed an answer and counterclaim.

¶5 The record reflects that, from that time until the complaint was dismissed in December 2006, the following occurred: Mortensen replied to the counterclaim; the parties stipulated to dismiss Rose's "managing member" and her husband; one subpoena for a witness deposition was issued; and Mortensen filed a notice of deposition for Rose's previously dismissed "managing member." No motion to set and certificate of readiness was filed, despite the trial court's earlier notice in May and even though the case had been on the inactive calendar for about seven months.

¶6 On December 20, 2006, the trial court dismissed the case without prejudice for lack of prosecution pursuant to Rule 38.1(d).[1] Approximately six weeks later Mortensen

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[1]In 2000, our supreme court abrogated the Uniform Rules of Practice of the Superior Court, including Rule V, which concerned the inactive calendar and failure to prosecute. That rule was incorporated into the current rule dealing with those issues, Rule 38.1. *See* 198 Ariz. XXXIX; 198 Ariz. XLI. Rule 38.1(d) addresses cases on the court's inactive calendar and provides:

> The clerk of the court or court administrator shall place

simultaneously moved to set aside the dismissal and filed a motion to set and certificate of readiness. In March 2007, the court declined to set aside the dismissal, stating that it "d[id] not find a sufficient reason" to do so and that, "[g]iven the history of this case, including, but not limited to, the lack of prosecution by the Plaintiff, the Court finds no good cause stated for granting of the Motion." This appeal followed.

Discussion

¶7 Mortensen appeals only from the trial court's March 27 order denying his motion to set aside the dismissal. We first note that, although the appellate rules require an appellant to "indicat[e] briefly the basis of the appellate court's jurisdiction," Ariz. R. Civ. App. P. 13(a)(3), Mortensen cites only A.R.S. § 12-120.21(A)(1), which Rose has not

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> on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness has not been served within nine months after the commencement thereof, except that in domestic relations cases, by general order of the presiding judge in any county or by local rule, the time within which domestic relations cases shall be placed on the Inactive Calendar may be shortened to not less than 120 days. All cases remaining on the Inactive Calendar for two months shall be dismissed without prejudice for lack of prosecution, and the court shall make an appropriate order as to any bond or other security filed therein, unless prior to the expiration of such two months period[:]
>
> (1) A proper Motion to Set and Certificate of Readiness is served; or
>
> (2) The court, on motion for good cause shown, orders the case to be continued on the Inactive Calendar for a specified period of time without dismissal.

questioned. *See* Ariz. R. Civ. App. P. 13(b). That statute provides this court with "[a]ppellate jurisdiction in all actions and proceedings originating in or permitted by law to be appealed from the superior court" but does not itself provide a basis for Mortensen's appeal. § 12-120.21(A)(1). Nonetheless, considering the issue sua sponte, as we must, *see Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶ 8, 161 P.3d 1253, 1257 (App. 2007), we conclude we have jurisdiction pursuant to A.R.S. § 12-2101(C) to review the trial court's March 2007 order denying Mortensen's motion to set aside the court's prior order of dismissal.

¶8 An order dismissing an action for lack of prosecution is an appealable order. *Johnson v. Elson*, 192 Ariz. 486, ¶ 6, 967 P.2d 1022, 1024 (App. 1998); *see also BCAZ Corp. v. Helgoe*, 194 Ariz. 11, ¶¶ 11-12, 976 P.2d 260, 263 (App. 1998). Therefore, the grant or denial of a motion to set aside such a dismissal is "a 'special order made after final judgment,'" appealable under § 12-2101(C). *Johnson*, 192 Ariz. 486, ¶ 6, 967 P.2d at 1024. An appeal from such an order "raise[s] different issues than those that would be raised by appealing the underlying judgment; . . . affect[s] the underlying judgment, relate[s] to its enforcement, or stay[s] its execution; and . . . [is] not . . . 'merely "preparatory" to a later proceeding that might affect the judgment or its enforcement.'" *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 3, 9 P.3d 329, 331 (App. 2000), *quoting Arvizu v. Fernandez*,

183 Ariz. 224, 227, 902 P.2d 830, 833 (App. 1995), *quoting Lakin v. Watkins Associated Indus.*, 863 P.2d 179, 184 (Cal. 1993).[2]

¶9 On the merits, Mortensen first cursorily raises as an issue whether, in its December 2006 order, the trial court "err[ed] as a matter of law by . . . dismissing the case from the inactive calendar." But again, Mortensen has appealed only from the denial of his motion to set aside the dismissal, a motion the parties agree was at least functionally brought pursuant to Rule 60(c), Ariz. R. Civ. P. *See Resolution Trust Corp. v. Maricopa County*, 176 Ariz. 631, 634, 863 P.2d 923, 926 (Tax 1993). "The scope of an appeal from a denial of a Rule 60 motion is restricted to the questions raised by the motion to set aside and does not extend to a review of whether the trial court was substantively correct in entering the judgment from which relief was sought." *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304,

[2]A request to set aside a dismissal without prejudice for failure to prosecute under Rule 38.1, is generally made by a motion under Rule 60(c), Ariz. R. Civ. P. *See Resolution Trust Corp. v. Maricopa County*, 176 Ariz. 631, 634, 863 P.2d 923, 926 (Tax 2003). But a dismissal under Rule 38.1 could also be appealed directly. And, although a party who appeals from an order of dismissal itself could raise issues similar to those raised here, *see Jepson v. New*, 164 Ariz. 265, 269-70, 792 P.2d 728, 732-33 (1990), the issues on appeal would primarily relate to the propriety of the dismissal in the first instance, rather than whether the party whose action the court dismissed was entitled to reinstatement of the action due to mistake, inadvertence, or excusable neglect under Rule 60(c)(1), or "'extraordinary circumstances of hardship or injustice,' other than or in addition to those circumstances set out in clauses (1) through (5)" under Rule 60(c)(6). *Gorman v. City of Phoenix*, 152 Ariz. 179, 182, 731 P.2d 74, 77 (1987), *quoting Davis v. Davis*, 143 Ariz. 54, 57, 691 P.2d 1082, 1085 (1984); *see also BCAZ Corp.*, 194 Ariz. 11, ¶ 28, 976 P.2d at 266 (distinguishing cases brought under Rule 60(c) and case in which party had complied with former rule on failure to prosecute and sought relief from improper dismissal).

311, 666 P.2d 49, 56 (1983). Thus, we do not reach the question whether the trial court erred by dismissing the case under Rule 38.1 in the first instance.

¶10 Mortensen primarily argues the trial court erred in its March 2007 order by "denying [his] Motion to Reinstate the case and place it on the Active Calendar." He maintains he "met the burden of Rule 60(c) . . . because all of the factors required by [*Gorman v. City of Phoenix*, 152 Ariz. 179, 731 P.2d 74 (1987),] were clearly present in the record before the trial court." We review the trial court's denial of Mortensen's motion for an abuse of discretion. *See Gorman*, 152 Ariz. at 182, 731 P.2d at 77; *see also Johnson*, 192 Ariz. 486, ¶ 9, 967 P.2d at 1024.

¶11 In *Gorman*, our supreme court discussed the standard for granting relief from a dismissal for failure to prosecute. 152 Ariz. at 182, 731 P.2d at 77. As did the appellant in that case, Mortensen relies solely on Rule 60(c)(6) in seeking relief. Rule 60(c) provides that, "[o]n motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for [five separately enumerated reasons] or . . . (6) any other reason justifying relief from the operation of the judgment." Ariz. R. Civ. P. 60(c). "Thus, to obtain relief under Rule 60(c)(6), [Mortensen] must show 'extraordinary circumstances of hardship or injustice,' other than or in addition to those circumstances set out in clauses (1) through (5)." *Gorman*, 152 Ariz. at 182, 731 P.2d at 77, *quoting Davis v. Davis*, 143 Ariz. 54, 57, 691 P.2d 1082, 1085 (1984). To determine whether a party has met this standard,

> trial courts should consider carefully . . . [whether] (1) the parties were vigorously pursuing the case, (2) the parties were taking reasonable steps to inform the court of the case's status, and (3) the moving party will be substantially prejudiced by, for example, the running of the limitations period if the dismissal is not set aside. If all these factors are present, even doubtful cases should be resolved in favor of the party moving to set aside the dismissal.

Id. at 183-84, 731 P.2d at 78-79; *see also Jepson v. New*, 164 Ariz. 265, 270, 792 P.2d 728, 733 (1990).

¶12 In his motion below, Mortensen stated only that "[t]he parties ha[d] been actively preparing th[e] case for trial, and actively engaged in discovery." As Rose points out, Mortensen "provided no factual basis for his blanket assertion that the parties had been actively preparing the case for trial and actively engaged in discovery." He did not cite any of the authority he has presented to this court, nor did he argue that the parties had taken steps to inform the trial court of the case status nor explain how he would be prejudiced by the dismissal. He has also failed to argue, either below or on appeal, "that he acted promptly in seeking relief and that he had a meritorious claim." *Jepson*, 164 Ariz. at 270, 277, 792 P.2d at 733, 740 (requiring movant to "show that he acted promptly in seeking the continuance and that his claim is meritorious" in order to obtain relief under Rule 60(c)). In short, Mortensen did not adequately address, let alone establish, the prerequisite for obtaining relief under Rule 60(c)(6).

¶13 In addition, as Rose asserts, "the record shows that very little, if any, discovery had taken place in the 16 months" after the case was filed. As noted above, the record

shows that, after an initial series of filings related to service of the complaint and after Rose had answered and counterclaimed, little happened in the case in the six months before its dismissal. Mortensen filed a reply to Rose's counterclaim, Rose served an initial disclosure statement, the parties stipulated to dismiss two defendants, one subpoena was issued, and one deposition was noticed. In determining whether a case has been vigorously pursued, a court must consider "the activities of all parties involved, not just the plaintiff's," and "discovery need not be formal to evince vigorous prosecution." *Jepson*, 164 Ariz. at 276, 792 P.2d at 739. Even under that standard, however, we cannot say the record shows the type of "vigorous pursuit" and "diligence" required under *Gorman*. 152 Ariz. at 183, 731 P.2d at 78. Indeed, although at least some discovery had been scheduled, the record does not show that any had actually occurred.

¶14 Likewise, we agree with Rose that the record does not substantiate Mortensen's blanket assertion that the trial court "was aware of the exchange of disclosure, and of the pending status of discovery." It is unclear from the record how the trial court could or would have known whether Mortensen had even served his initial disclosure statement. The only discovery-related matters apparent in the record were a subpoena issued nearly two months before the dismissal and the notice of a deposition that had not yet been taken. And, although Mortensen argues he will be "prejudiced by the running of the limitations period if the dismissal is not set aside," "passage of the limitations period

standing alone does not justify relief under Rule 60(c)(6)." *Gorman*, 152 Ariz. at 182, 731 P.2d at 77.

¶15 In sum, even had Mortensen properly raised and attempted to demonstrate his entitlement to relief under Rule 60(c) below, we cannot agree with his contention that "[t]he trial court erred as a matter of law" in refusing to reinstate his complaint. Nor do we find any abuse of discretion in the trial court's ruling.

Disposition

¶16 The trial court's order denying Mortensen's motion to set aside the dismissal is affirmed. In our discretion, Rose's request for attorney fees on appeal, made pursuant to A.R.S. § 12-341.01, is granted upon its compliance with Rule 21, Ariz. R. Civ. App. P. *See Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, ¶ 39, 119 P.3d 477, 485 (App. 2005). We deny Rose's request for an award of fees incurred "in defending the action at the trial court," the court having exercised its discretion in denying that request below.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge